

There is no doubt in this case that the appellant had lost the chance of putting to the witness Lee Tat Hin his previous statement in case it happened to be contradictory. The omission by the Magistrate to refer to the statement of Lee Tat Hin had prejudiced the appellant and it cannot be said that the appellant had a fair trial. There has been a failure of justice in this case and the conviction cannot be sustained. The conviction of the appellant is quashed and the sentence set aside.

I do not order a retrial as it appears to me that in this case it would be inequitable to order a new trial.

Appeal allowed.

Re LIEW SWEE LAN

[O.C.J. (Suffian J.) May 15, 1962]

[K.L. — In Bankruptcy No. 129 of 1960]

Bankruptcy — Act of bankruptcy — Security bond, by surety — Agreement therein that decree be executed against surety in same way as against defendant — Judgment against defendant unsatisfied — Whether separate judgment necessary against surety to found bankruptcy petition — Bankruptcy Ordinance, 1959, s.3.

This was a bankruptcy petition against one L.S.L. who stood surety for the defendant in a civil suit in which the petitioners were plaintiffs. The form of the security bond stated that a decree obtained against the defendant may be executed against the surety in the same way as it might be executed against the defendant. Judgment having been obtained against the defendant but same neither being executed against nor satisfied the petitioners petitioned for a receiving and adjudication order against the surety.

Held: in the absence of a separate judgment against the surety, the Court could not be satisfied that an act of bankruptcy had been committed by the surety.

BANKRUPTCY PETITION.

S. D. K. Peddie for the creditors.

E. C. Khoo for the surety.

Suffian J.: The petitioners were plaintiffs in Kuala Lumpur Civil Suit No. 250 of 1956 in which one Mohamed Said was the defendant. On 5th November, 1956, before Abdul Hamid J. in Chambers judgment was entered against the defendant who was absent. On 10th December, 1956, Abdul Hamid J. set aside this order on the application of the defendant and allowed him to defend the action on his furnishing security in the sum of \$5,000 in one surety. Mr. Liew Swee Lan alias Lee Kim Seng stood surety for him, signing a security bond in the presence of the Senior Assistant Registrar in these terms:

"Security Bond"

WHEREAS the above suit has been instituted and on the 10th December, 1956, the above-named defendant, Mohamed Said alias Shamsudin Mohamed bin Shamsudin, was ordered to furnish surety in the sum of \$5,000 (Dollars five thousand) with one surety to the satisfaction of the Senior Assistant Registrar of this Court.

NOW THEREFORE I, Liew Swee Lan alias Lee Kim Seng, proprietor of Kien Lee & Co., of No. 145, Sungei Besi Road, Kuala Lumpur, hereby undertake and submit myself to the jurisdiction of this Court and in

A the case of any failure by the said Mohamed Said alias Shamsudin Mohamed bin Shamsudin the defendant abovenamed to appear at any time when called upon while the suit above-mentioned is pending and until execution or satisfaction of any decree that may be passed against him in the said suit, I hereby bind myself to pay the sum of \$5,000 which the said defendant be ordered to pay in the said suit and agree that the said decree may be executed against me in the same way as it might be executed against the said defendant."

B The suit was heard on 6th May, 1959, and on 26th May, 1959, Smith J. gave judgment against the defendant.

C It is alleged by the plaintiffs that the judgment has neither been executed against nor satisfied by the defendant and it is urged on their behalf that in view of the underlined words in the Security Bond this judgment can be enforced against Mr. Liew without any need to obtain a separate judgment against him. A Bankruptcy Notice dated 8th February, 1961, was served on him requiring him to pay the successful plaintiffs "the sum of \$5,000 claimed by them as being the amount due on a Security Bond dated the 13th day of March, 1957, which you signed in their favour in the Kuala Lumpur High Court Civil Suit No. 250 of 1956 which they as plaintiffs had instituted against the defendant therein and in which a final judgment amounting to \$14,500, plus interest and costs, were obtained by them against the said defendant at the High Court at Kuala Lumpur dated 26th day of May, 1959, whereon execution has not been stayed, ..."

The plaintiffs then petition for a receiving and adjudication order against Mr. Liew.

F Inche' Khoo for Mr. Liew opposes the petition on two grounds:—

(1) The judgment debt in the suit had already been satisfied by the defendant.

(2) The petitioning creditors have never obtained a final judgment or final order against him for the said sum of \$5,000.

G By consent it was agreed to dispose of this matter at this stage on the basis of ground (2) only.

Inche' Peddie for the petitioning creditors was unable to support his clients' petition by any statutory authority or reported decision.

H Having considered this matter with some care, I feel bound to dismiss the petition.

I By sub-section (2) of section 6 of the Bankruptcy Ordinance No. 20 of 1959 at the hearing of a petition such as this, the Court shall require proof of, among other things, Mr. Liew's act of bankruptcy, and if satisfied with the proof, may make a receiving order in pursuance of the petition, but if, in the words of sub-section (3), "the Court is not satisfied with the proof of . . . the act of bankruptcy . . . the Court may dismiss the petition." Acts of bankruptcy are dealt with in section 3, of which only paragraph (i) of sub-section (1) is relevant. That provision reads —

"A debtor commits an act of bankruptcy . . . if a creditor has obtained a final judgment or final order against him for any amount and execution thereof not having been stayed has served on him in the Federation . . . a bankruptcy notice under this Ordinance requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order . . ."

In this case a final judgment or final order has no doubt been obtained by the petitioners against the defendant in Civil Suit No. 250 of 1956, but no such judgment or order has been obtained either in that suit or elsewhere against the surety, Mr. Liew.

In the case of a bail bond in criminal trials guaranteeing the production of the accused, proceedings may, if the accused fails to appear, be instituted without further formality against the bailor to forfeit his bond, but this is expressly provided for by legislation, section 404 of the Federated Malay States Criminal Procedure Code. In this case my attention has not been directed to any similar statutory provision to enable the petitioners to proceed direct against Mr. Liew in the absence of a separate judgment against him and in the absence of such statutory provision I must dismiss this petition, for I am not satisfied with the proof of the act of bankruptcy on the part of Mr. Liew. This petition is accordingly dismissed, with costs.

Petition dismissed.

Solicitors: *Bannon & Bailey*;

NAMBIAR v. CHIN KIM FONG

[O.C.J. (Adams J.) May 22, 1962]

[Johore Bahru — Civil Suit No. 74 of 1961]

Tort — Detinue — Car sent for repairs by plaintiff's insurance company — Demand for return after repairs — Bailment — Refusal to return unless plaintiff settled the repair bill or signed discharge form — Whether bailment terminated.

The plaintiff's car which was damaged in an accident was sent to the defendant's workshop for repairs by the plaintiff's insurance company. The repairs being unsatisfactory the car was sent back for fitting with new parts. The plaintiff visited the defendant's workshop from time to time and protested at the manner in which the new parts were fitted. On July 27, 1961, the defendant informed the plaintiff that the car was ready for delivery. On August 12 the plaintiff called on the defendant and demanded the return of the car which demand was refused unless the plaintiff settled the repair bill. Subsequently the plaintiff asked again for the return of the car but the defendant refused to release the car unless the plaintiff signed a discharge form stating that the repairs to the car were entirely satisfactory. The plaintiff refused to do so and instituted the present proceedings.

Held: the bailment was at an end once the repairs were completed and the defendant was not entitled to put a condition on the release of the car.

Cases referred to:—

- (1) *Barnett v. The Crystal Palace* 175 E.R. 1134.
- (2) *Cobbett v. Clutton* (1826), 172 E.R. 213.
- (3) *Rosenthal v. Alderton & Sons* [1946] K.B. 374.

A CIVIL SUIT.

T. G. Dunbar for the plaintiff.

A. J. Braga for the defendant.

Adams J.: This is an action in detinue by the plaintiff for the return of his Triumph Herald Motor Car JB 499 and damages for its detention. Fortunately the important and relevant facts are not in dispute. The only facts that are in dispute are not really material to any issue other than, perhaps, the reliability of the evidence of the witnesses. The facts are as follows. The plaintiff Mr. Nambiar is a junior technician employed in the Public Works Department and at the material times was resident at Rengam. His work involves the inspection and supervision of the maintenance and repair of the public highways and roads in his area. In order to carry out this work he bought himself a Triumph Herald Motor Car JB 499 from Keng San Motors which firm later became known as Lum Bee Motors at Kluang. He drew a car allowance from the Government in respect of the use of this car. The person who sold him the motor car was Mr. Woo Kai Liap, and it was also Mr. Woo Kai Liap who arranged for the comprehensive insurance of the motor car with the Safety Insurance Company Ltd. of which he was the Kluang agent. On the 4th September, 1960, the motor car which was just about six months old was involved in an accident in which the bonnet, one of the wings and one of the doors were severely damaged. Mr. Nambiar immediately advised Mr. Woo Kai Liap as agent of the Safety Insurance Company Ltd. and also the Head Office of the Insurance Company concerning the accident. He arranged for the vehicle to be towed to a workshop in Simpang Rengam.

Mr. Nambiar says that some ten days later an inspector from the Insurance Company came down and inspected the car. There is a dispute as to where this took place, but it is immaterial.

G Mr. Nambiar requested that the car be repaired by the local agents, that is to say Century Motors in Singapore, but this was not permitted and he was advised that the repairs would be carried out by a local repairer at Kluang. This was the defendant's firm. In the event the defendant was instructed by the Safety Insurance Company Ltd. to carry out the repairs to the extent of \$600 by panel beating and not by the substitution of new parts. It is apparent that this repair was not satisfactory, because later after complaint by the plaintiff the Insurance Company ordered the defendant to fit new parts and these were ordered through Mr. Woo Kai Liap. There is a considerable divergence of opinion as to what happened after this, but I consider that most of this is immaterial to the issues that fall to be decided. It suffices to say that the plaintiff visited the defendant's workshop from time to time and was not satisfied with the fitting of the new parts which were being hammered into place whereas they should